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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 576

LION OIL COMPANY,

Petitioner,

vs.

MARY ALTENBAUMER, A WIDOW; ODEAN ALTENBAUMER; DURRELL ALTENBAUMER, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lion Oil Company, a corporation, respectfully prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review a decision of that court heretofore rendered, which decision erased a jury verdict in petitioner's favor (R. 355). Petitioner respectfully submits that such court refused to follow and apply the Federal Rules of Civil

Procedure and the Fifth and Seventh Amendments to the Constitution of the United States, all as will be specifically presented in detail hereinafter; such claims were presented by petitioner's petition for rehearing which was overruled without opinion (R. 357-380).

Summary Statement of Matter Involved

Parties to the Action

The cause was instituted by respondents, Mrs. Mary Altenbaumer as surviving widow of her deceased husband, Frederick William Altenbaumer, Durrell Altenbaumer, a son, and Odean Altenbaumer, a daughter, as survivors of said deceased, against the petitioner, because of alleged common law negligence of such petitioner causing the death of deceased. Jurisdiction was based upon diversity of citizenship (R. 1-9). The respondent, Hartford Accident and Indemnity Company, intervened, claiming a right of subrogation as the compensation insurer of the employer of deceased (R. 9-11).

Nature of the Action

The deceased was working in a pipe line construction gang constructing a pipe line located on an oil and gas lease belonging to petitioner, situated in Winkler County, Texas. It was claimed by respondents that petitioner, acting by and through its agents, servants, and employees, negligently and without warning to the deceased, turned high pressure gas into the line which had been constructed, with a resultant fire and death of deceased (R. 1-12).

A four-inch pipe line, 4,000 feet in length, had been completed upon the date of the occurrence, but had not been connected to any high pressure gas line, either at the end which was designated in the record as the North end, or at the South end. The evidence reflected that the deceased

was an employee of a co-partnership of which one Hugh Sasser was a member and that on the date of the accident the said Hugh Sasser was in charge of the crew of which deceased was a member; that on the morning of such date the North end of the four-inch line was hooked into a high pressure gas line by the gang or crew of which Hugh Sasser was in charge; that at such time two employees of petitioner, namely, Bob Hopson and Sam Stroder, were present and they showed Hugh Sasser and the members of his crew the manner in which such four-inch line could be hooked into the high pressure gas line (R. 29-35). It remained for the South end of the line to be hooked into another high pressure gas line and at approximately 1:00 o'clock on such day Bob Hopson, the aforesaid employee of petitioner, told Hugh Sasser that before the South end of the line could be hooked, such newly constructed four-inch line would have to be "blown out"; by "blowing out" is meant the turning of high pressure gas into a pipe line which does not have the other end connected for the purpose of removing foreign substances which might be present in the pipes; that Hopson, as an employee of petitioner, instructed Sasser, who was in charge of the crew of which deceased was a member, to get his men out of the way because he (Hopson) was going to blow the line out in ten or fifteen minutes (R. 40, 81, 241, 342). Prior to said instructions, the other members of the crew had left for the South end of the line and Hugh Sasser then left in his automobile for such point, which was approximately 4,000 feet distant; that thereupon Hopson and Stroder went to the compressor for the purpose of preparing to "blow out" the line; from such point the two employees could not see the South end of the line; that Hugh Sasser reached the South end of the line in a time estimated at from two to four minutes after Hopson had instructed him to get his men out of the way; after reaching the South end of the

line, Sasser decided that the pipe line should be moved before it was blown out in order to keep gas from blowing into the high pressure gas line; that instead of getting his men out of the way, and without any advice to Hopson and Stroder, Hugh Sasser instructed the men to get crowbars and move the four-inch line (R. 256-258). The deceased was thus engaged at the time of the fire when the gas was turned on by the servants of the petitioner within ten or fifteen minutes after Sasser left. The cause of the fire does not appear in the record.

From the above evidence it became a crucial question in the case with regard to whether Sasser and the deceased were directly under the control of the petitioner notwithstanding any general employment of the deceased by an independent contractor; from the following facts the jury could rightly indulge the inference that Sasser and the deceased were under the control of the petitioner, such facts being:

1. The pipe line was on a lease belonging to petitioner.
2. Petitioner's servants informed Hugh Sasser and his crew of the manner of making the connection to the North end, and were present.
3. Hopson, petitioner's servant, directed Sasser to get the men of his crew, including the deceased, out of the way.
4. The operation of turning on the gas was under the control of the petitioner.
5. Sasser was moving the four-inch line in an attempt to preserve petitioner's property.

Because of such possible inferences it became incumbent upon the petitioner to prove its allegation to the effect that the partnership, Bradberry and Sasser, was an independent contractor, and that such independent contractor had direct control of the actions of deceased at the time of the accident; that Sasser in failing to get his men out of the

way was not acting as a servant, agent, or employee of the petitioner, but solely as an independent contractor. The petitioner pled the terms of its contract with Bradberry and Sasser wherein such contractor was required to maintain control over its employees and was required to furnish at its own expense insurance coverage, including Workmen's Compensation Insurance, upon its own men (R. 17-18). In an attempt to prove such allegation and offset any inferences that the petitioner controlled either deceased or Hugh Sasser at the time of the accident, the petitioner offered evidence of the oral contract in its totality, including the requirement that such contractor was required to take out Workmen's Compensation Insurance on its own men (R. 175-177).

The verdict was set aside on account of the introduction of this evidence. Contrary to the statement in the opinion of the Court of Appeals Below (R. 355), this evidence was not constantly kept before the jury, because this is the only point in the entire record where any such evidence appears. Also, contrary to such opinion, there was no proof throughout the entire record which reflected that the deceased was actually covered by compensation insurance or that the respondents Altenbaumer had received any sum whatsoever by virtue of any claimed insurance (R. 26-27). The only proof was that according to the terms of the contract the independent contractor, Bradberry and Sasser, was required to keep their men insured.

The Court of Appeals Below has held that as a matter of law this evidence should have been excluded and has wiped out a jury verdict in complete derogation of the rights of a litigant in a Federal Court, as will be hereinafter set forth in more detail.

Proceedings in the District Court

The cause was submitted to a jury on a general charge and verdict returned in favor of the petitioner as the defendant in the trial court; judgment in favor of petitioner was entered thereon (R. 326). There were no exceptions to the charge on the part of the respondents (R. 273).

The respondents filed a motion for a new trial in which motion it was asserted that the verdict was actuated by prejudice (R. 328-333). Such motion was overruled by the trial court (R. 333-334). In overruling such motion, the trial court stated in substance that the cause had been fairly and fully tried and taking into consideration the whole record, the motion was overruled (R. 281).

Proceedings in the Court of Appeals

The original record was received by such court on September 15, 1949, (R. cover page). Thereafter without any notice whatsoever to the petitioner, a supplemental record was received by such court on October 3, 1949, (R. 344-352). So far as the record reveals there was no notice whatsoever to petitioner and no request for such record. The certificate of the District Clerk (R. 352) reflects that the supplementary transcript was a true and full "copy of the original Excerpts from Argument by Counsel for the Defendant to the Jury and Partial and Supplementary Transcript of Proceedings in the Case of Mrs. Mary Altenbaumer, et al. vs. Lion Oil Company, No. 885 Civil now remaining among the records of the said Court in my office." Such supplementary record purports to be excerpts from argument by counsel for petitioner without any showing of the entire argument and without any showing whatsoever of argument of all counsel. There is nothing in the record which reflects who made the excerpts or under what circumstances they were present in the record; no file mark

appears thereon. Such record bears no authentication whatsoever from either the trial court or counsel for petitioner.

Such supplementary record reflects no compliance with the Federal Rules of Civil Procedure. Nevertheless the Court of Appeals below quoted therefrom (R. 354).

The cause was after submission reversed and remanded, the court filing its written opinion, which opinion has not been published at the time of preparation of this petition. Such opinion (R. 353-355) cites as authority for its action three Texas cases, which prescribe rules of procedure and exclusion applicable in the courts of Texas.[1] Such cited cases are in no degree apposite, in that they do not involve the same legal relationship; likewise the opinion is thought to be directly contrary to a holding of this same court. *Skelly Oil Company* v. *Amacker* (C. A. 5th, 1944), 140 Fed. (2d) 21. The case of *Waldron* v. *Waldron*, 156 U. S. 361, which also appears in the footnote to the court's opinion is in no degree apposite.

Petitioner filed a petition for rehearing (R. 357-380), in which it complained of the action of the Court of Appeals below in erasing a jury verdict in derogation of the specified Federal Rules of Civil Procedure and the specified provisions of the Constitution of the United States, all as will be hereinafter set forth in detail.

Basis of This Court's Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U. S. C. A., Sec. 1254(1) as enacted by Public Law 773, 80 Cong. 2nd Session.

Petitioner's petition for a rehearing which is the basis for this petition was denied by the Court on January 22, 1951, without an opinion (R. 381). The within petition for certiorari was filed on the 26th day of February, 1951. The

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[1] *Texas Co.* v. *Betterton*, 88 S.W. (2) 1038; *Myers* v. *Thomas*, 143 Tex. 502, 186 S.W. (2) 811; *Ford* v. *Carpenter*, 216 S.W. (2) 558.

issuance of mandate was stayed for a period of thirty days from January 29, 1951, to permit the filing of this petition.

Questions Presented

1. Whether the Court of Appeals below had the right and authority to erase a jury verdict by the application of a procedural rule of exclusion applicable to subrogation recoupment actions pending in the courts of the State of Texas in complete derogation of the Fed. Rules of Civ. Proc., Rule 43(a), 28 U. S. C. A. The opinion of the Court of Appeals below (R. 354-356) considered no applicable authorities under Federal Law and it in no manner considered Rule 43(a). It entirely ignored the Rules which are paramount in the Federal Courts and decided such cause entirely upon state procedure and practice. Contrary to Fed. Rules of Civ. Proc., Rule 43(a), U. S. C. A., it in no manner considered the decided cases in the courts of the United States which hold evidence of an insurance agreement admissible when such evidence tends to prove or disprove a controverted fact.[2] The Court of Appeals below has held state procedure paramount and it has nullified Rule 43(a).

2. Whether the Court of Appeals below has ignored the Fed. Rules of Civ. Proc., Rule 61, 28 U. S. C. A., which requires such court to examine the entire record to determine whether substantial justice has been done. Petitioner submits that the opinion and the manner in which such court has failed to consider the entire record constitute an unwarranted departure from proper judicial functions. Petitioner submits such court has created prejudice as a matter of law upon a technical question with regard to the

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[2] Vol. 27 Am. Jur., Independent Contractors, Page 502, Sec. 23. The authorities appearing in the annotation contained in 4 A.L.R. (2) 776, and many other authorities which will be hereinafter submitted, apparently were not even considered by the court.

admissibility of evidence when the entire record reflects that no prejudice could have existed and that the only judgment which could have been rendered was that which was rendered by the trial court; that if there existed any error with regard to the admissibility of evidence, it was such as could not have deprived the respondents of a substantial right.

3. Whether the Court of Appeals below ignored Fed. Rules of Civ. Proc., 75(a)(b), 28 U. S. C. A., in such court's consideration of the supplemental transcript of the record (R. 344-352), which reflects on its face a non-compliance with such Rule 75(a)(b). Such supplemental transcript contains claimed excerpts from argument of counsel for petitioner only, without the entire argument of all counsel being shown anywhere in the record; it likewise contains claimed partial proceedings in the selection of the jury and the reading of petitioner's answer to the jury with no authentication by either the trial court or an agreement by counsel for petitioner. Such supplement has never been settled either as a bill of exceptions or an agreed record. Such supplemental transcript reflects no notice whatsoever to counsel for petitioner and likewise no file mark upon the part of the clerk, but only a certificate from the records now remaining in the clerk's office with no explanation of the manner in which such records were received. Notwithstanding such lack of authentication, the Court of Appeals below quotes therefrom in its footnote to the opinion (R. 354).

Petitioner submits and will contend that the consideration thereof was a violation of the accepted standards of judicial procedure and specifically a violation of Fed. Rules of Civ. Proc., Rule 75, U. S. C. A.

4. Whether the Court of Appeals below has deprived the petitioner of its right to a jury trial upon all issues of fact involving the independent contract, contrary to the Seventh

Amendment to the Constitution of the United States, by a suppression of the proof of one of the terms of such contract with the independent contractors by the creation of prejudice as a matter of law, which prejudice is not reflected by the record. Petitioner will contend that such action contravenes the Seventh Amendment to the Constitution of the United States.

5. Whether the Court of Appeals below has re-examined the facts tried by the jury in such cause in a manner contrary to the rules of common law in violation of the Seventh Amendment to the Constitution of the United States. Such court has reversed the action of the trial court, which found no prejudice upon a hearing of the motion for a new trial filed on behalf of respondents and the setting aside of such action of the trial court is contrary to the rules of common law as the courts of the United States have repeatedly held since the establishment of Federal Courts. Such has been the uniform holding in the Fifth Circuit.[3]

The petitioner will likewise contend that an incorrect construction has been placed upon the record in that the opinion states that the inadmissible evidence reflects that the deceased was covered and protected by compensation insurance when there was no such evidence in the record; petitioner proved that under one of the terms of the independent contract the contractor was required to carry Workmen's Compensation upon all of its employees (R. 176-177). The opinion further incorrectly reflects the record in that it states that the matter of insurance was continuously brought and kept before the jury, when the record reflects that in only one isolated instance was this evi-

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[3] *Pasatex Pipe Line Co.* v. *Murray* (C.A.—5th—1948), 168 F. (2d) 661; *Home Insurance Company* v. *Tydal Co., et al.* (C.A.—5th—1946), 157 F. (2d) 851; *Dowell, Inc.* v. *Jowers* (C.A.—5th—1950), 182 F. (2d) 576; *Railway Express Agency* v. *Cox* (C.A.—5th—1950), 179 F. (2d) 593, 596; *Hanrik* v. *Lilly* (C.A.—8th—1948), 167 F. (2d) 159, page 160.

dence brought before the jury (R. 176-177); the unauthenticated supplemental transcript which the court had no right to consider under the principles of the common law, reflects two other references: (1) a reading of the petitioner's answer to the jury, which is the equivalent of an opening statement in Texas (R. 351); (2) by an excerpt from the argument by counsel for petitioner, which claimed excerpt was improperly before the court (R. 347). Likewise such opinion says that the evidence was highly prejudicial and made more so by the way in which it was brought and kept before the jury, which is not only incorrect under the record, but it is an indefinite, evasive and equivocal disposition of the rights of a litigant to a definite holding.

6. Whether the Court of Appeals Below has deprived the petitioner of equal protection of the law and due process of law in the Federal Courts contrary to the Fifth Amendment to the United States Constitution by the application of a Texas rule of exclusion which is peculiarly a procedural rule in the courts of the State of Texas; that other litigants in Federal Courts in other jurisdictions are not so deprived of such right to prove the same fact as a defense under Federal Law and the Fed. Rules of Civ. Proc., Title 28, U. S. C. A. Petitioner will hereinafter elaborate this point and attempt to demonstrate that under the Federal Rules of Evidence pertaining in other circuits, and also other states in the Fifth Circuit, such evidence as that which was excluded by the Court of Appeals Below is admissible and is not gravely prejudicial as a matter of law. The authorities and the contentions under this question will be hereinafter set forth more in detail.

Reasons for Allowance of Writ

(A) The Court of Appeals Below has ignored Fed. Rules of Civ. Proc., Rule 43(a), 28 U. S. C. A., which rule con-

trols the admissibility of evidence in the trial of civil actions in the District Courts of the United States and in total disregard of such rule, such court has held that a procedural rule of exclusion of evidence applicable to the trial of certain actions in the State Court of Texas likewise excludes evidence in the trial of civil actions in the District Courts of the United States.

It is submitted that this case has decided an important question regarding the admissibility of evidence in Federal Courts, which question has not been, but should be, settled by the Supreme Court. Such decision is also believed to be contrary to *Sibbach* v. *Wilson and Company, Inc.* (1941), 312 U. S. 1, 61 S. Ct. 422; 85 L. Ed. 479, wherein it was held that the Fed. Rules of Civ. Proc. controlled, regardless of any contrary rule of procedure in the courts of the state where such action was instituted. Such decision is likewise believed to be contrary to *Lyon* v. *Mutual Benefit Health and Accident Assn.* (1939), 305 U. S. 484, p. 492, 59 S. Ct. 297, p. 300, 83 L. Ed. 303, which case also holds that state procedural rules have no binding force and effect in the trial of causes in Federal Courts.

Such decision of the Court Below is likewise believed to be contrary to the numerous Circuit Court holdings since the promulgation of the rules which hold that Rule 43(a) is a rule of admissibility and not a rule of exclusion. Such decided cases will be cited in the accompanying brief. Petitioner respectfully directs the Court's attention to a law review article appearing in the Columbia Law Review during the year 1946 (Col. Law Review, Vol. 46, pp. 267-76, Mar. Issue 1946). It is entitled "Federal Courts Under Rule 43(a)". The author concludes such article with the doleful pronouncement that such rule has had no effect despite the good intentions, and the reforms which it was intended to bring about in the Federal Law of Evidence;

that notwithstanding such rule, the rule of evidence in Federal Courts is just as uncertain now as it was prior to the passage of such rule. Naturally, the petitioner feels that the action of the Court Below in this cause bears out such a doleful foreboding.

Petitioner respectfully submits that Rule 43(a) should receive a construction by this Honorable Court; that the question is of sufficient and critical importance in the trial of future causes in the Federal Courts to cause this Court to determine the meaning and effect of such rule as a guide in the future upon causes where state rules of exclusion come into play.

This reason for the allowance of the writ is developed in more detail under Point 1 of the accompanying brief, pp. 23-28.

(B) The decision of the Court of Appeals Below has ignored Fed. Rules of Civ. Proc., Rule 61, 28 U. S. C. A., in that the record in the cause clearly indicates that such rule has not been followed; the opinion does violence to the record; it reflects that the entire record has not been considered by the court to determine whether the claimed erroneous admission of evidence was of such a character as to affect the substantial rights of the parties.

The trial court overruled the respondents' motion for a new trial (R. 333) with the statement that the entire record reflected that the cause had been tried fully and fairly (R. 281). The action of the Court of Appeals Below in thus arbitrarily setting such action aside with no finding that the discretion of the trial court had been abused is contrary to such rule. Petitioner submits that an examination and Consideration of the entire record in this cause would have reflected that the facts therein were insufficient to have sustained a verdict in favor of respondents and that any verdict in their favor would have been set aside. If Rule

61 had been applied and the whole record considered, the court would have been bound to have held that any error with regard to the admission of evidence did not substantially affect the rights of the respondents. In so refusing to consider the entire record, such court has refused to apply Rule 61 and has thereby deprived petitioner of a federal right.

So far as petitioner can determine, this rule has not been construed by the Supreme Court and the importance of such rule to litigants in Federal Courts and the rights secured thereby should warrant a construction thereof by the Supreme Court.

This reason for the allowance of the writ is developed in more detail under Point 2 of the accompanying brief, pp. 28-31.

(C) The Court of Appeals Below has arbitrarily and unreasonably deprived the petitioner of its right to due process of law, because of a procedural rule of exclusion prevailing in the courts of Texas; that under the Fifth Amendment to the United States Constitution the petitioner is entitled to a jury trial upon all issues of fact; that likewise under the Seventh Amendment to the United States Constitution, it is entitled to such jury trial; that the suppression and curtailment of evidence which is relevant has deprived petitioner of its right to prove its contract with the independent contractor in totality.

If the petitioner had been fortunate enough to have defended this cause in other states comprising the Fifth Circuit, notably Georgia or Mississippi, the evidence which the Court of Appeals Below excluded would have been admissible even though such evidence had gone to the extent of proving direct coverage by insurance.[4] So far as the

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[4] *Ingalls Shipbuilding Co.* v. *Trehern* (C.A.—5th—1946) 155 F. (2d) 202; *Acme Freight Lines, Inc.* v. *Blackmon, et al.* (C.A.—5th—1942) 131 F. (2d) 62.

petitioner can determine, there are no cases in any circuit which announce a contrary rule of admissibility. If the question were squarely presented to the Texas Courts, petitioner submits that such courts would hold such evidence admissible even though it proves coverage by insurance.[5] The petitioner is entitled to the same right to present its defense of a contract in its totality as litigants in other Federal Courts; that the mere fact that the Courts of Texas apply a rule of exclusion to certain situations does not deprive petitioner of such right to the same rules of procedure as other litigants in Federal Courts; that this denial on the ground of a rule of exclusion was a violation of its rights to a jury trial of all questions of fact under the Seventh Amendment to the United States Constitution and a denial of its rights to equal protection of the law and due process under the Fifth Amendment to the United States Constitution.

This reason will be further developed under petitioner's Points 3 and 4 which will be presented in the accompanying brief at pages 32-33.

(D) The Court of Appeals Below has re-examined the facts tried by the jury in this cause otherwise than according to the rules of common law, contrary to the Seventh Amendment to the United States Constitution.

The record reflects that the respondents filed a motion for a new trial in which they claimed that the verdict in petitioner's favor was motivated by prejudice and that it was contrary to the evidence as well as against the weight

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[5] *Aguelera, et al.* v. *Reynolds Well Service, Inc.* (Tex. Civ. App.—1951) 234 S.W. (2d) 282, writ of error refused by the Supreme Court of Texas January 29, 1951; which case appears in Advance Sheet No. 2 of date January 2, 1951, which publication was after the filing of the opinion in this cause on December 21, 1950; *Harper* v. *Highway Motor Freight Lines* (Tex. Civ. App.—1936) 89 S.W. (2d) 446; *Hussmann* v. *Leavell and Sherman* (Civ. App.—1929) 20 S.W. (2d) 829, affirmed, 32 S.W. (2d) 643.

of the evidence (R. 328-333). In overruling this motion the trial court observed that the respondents had received a fair trial (R. 281). In finding the evidence highly prejudicial as a matter of law because of a Texas rule of exclusion, the petitioner submits that the Court has indulged in a re-examination of the facts, contrary to the Constitution of the United States. It is submitted that the Court of Appeals Below has reweighed the evidence contrary to the functions of an appellate court of the United States and has reviewed the action of the trial court in refusing to grant a new trial by its finding of prejudice as a matter of law when the record reflects no prejudice whatsoever. In fact the record reflects the contrary. In its action in thus re-examining the facts and the creation of prejudice as a matter of law, the court has reviewed the cause in a manner contrary to the Seventh Amendment of the United States Constitution and its action is probably contrary to *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439.

This reason will be further developed and other authorities will be cited under Point 5, pp. 34-35 of its brief.

(E) The Court of Appeals Below has so far departed from the accepted and usual course of judicial proceedings as to call for the supervision of the Supreme Court in the following:

Such court has considered and based error upon a supplemental record (R. 344-352), which bears no file mark in the trial court; such supplement reflects no authentication on the part of the trial court or on the part of the counsel for appellee; it reflects no compliance whatsoever with Fed. Rules of Civ. Proc., Rule 75(a)(b), 28 U.S.C.A., in that no notice of any character was served upon appellee of the filing or inclusion of such supplement; it does not

reflect any proceedings had in the court or the authorization for the filing of same, or who prepared the comments contained therein. Such supplement was quoted from by the Court Below in its opinion (R. 354, footnote).

The Court Below likewise departed from accepted standards when it says that the evidence was continuously brought and kept before the jury (R. 354) whereas the record reflects one isolated point in the record (R. 166-177). The pleading of such contract was a matter of essentiality (R. 21-23) and the claimed excerpt from argument is improperly before the court, because all argument is not brought up and because the supplemental transcript is unauthenticated (R. 345-352).

Petitioner submits that Fed. Rules of Civ. Proc., Rule 75, 28 U.S.C.A., has never been construed by the Supreme Court and that in view of the action in this cause, such rule should receive a construction; that the Court Below has not enforced this rule and it has also done violence to the record to such a degree that its action should warrant a supervision by this Honorable Court. This reason will be developed more in detail under Point of Error No. 6, appearing at Pages 36-37 of its brief.

Prayer

For the reasons outlined above, developed more in detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of the Supreme Court of the United States to the United States Court of Appeals for the Fifth Circuit and that the duly certified transcript of the proceedings below, which accompanies this petition, shall be treated as though in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the decision of the Court of Appeals may be reversed and the judgment of the trial court affirmed,

and that your petitioner may be granted such other, further and different relief as this Court may deem proper.

Dated: Dallas, Texas, February 22, 1951.

O. O. Touchstone,
Attorney for Petitioner,
305 Southland Life Bldg.,
Dallas 1, Texas.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 576

LION OIL COMPANY,

Petitioner,

vs.

MARY ALTENBAUMER, A WIDOW; ODEAN ALTENBAUMER; DURRELL ALTENBAUMER, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondents

BRIEF IN SUPPORT OF PETITION

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Opinion Below

The opinion of the Court of Appeals appears in the record at pp. 353-355; it has not at the time of preparation of this petition been published in any reporter.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U.S.C.A., Sec. 1254

(1) as enacted by Public Law 773, 80 Cong. 2nd Session.

Petitioner's petition for a rehearing which is the basis for this petition was denied by the Court on January 22, 1951, without an opinion (R. 381). The within petition for certiorari was filed on the 26th day of February, 1951. The issuance of mandate was stayed for a period of thirty days from January 29, 1951, to permit the filing of this petition.

Statement of the Case

A summary statement of the matter involved herein is set forth in the foregoing petition at Page 2. A summary of the argument is set forth in the index.

Rules and Provisions of the United States Constitution Involved Herein

Fed. Rules Civ. Proc., 28 U.S.C.A.

Rule 43. Evidence

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order

or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 75. Record on Appeal—Reduction and Preparation

In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a praecipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his praecipe also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record, except expert testimony, shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the question presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his praecipe under paragraph (a) of this rule. He shall also notify the other parties or

their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statements be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal. Amended May 31, 1932.

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Specific Errors to Be Urged

The Court of Appeals Below erred in reversing and remanding the cause, because:

1. Such action was in denial of petitioner's rights under Fed. Rules Civ. Proc., Rule 43(a), 28 U. S. C. A.;

2. Such action was in denial of petitioner's rights under Fed. Rules Civ. Proc., Rule 61, 28 U. S. C. A.;

3. Such action was in denial of petitioner's rights to a trial by jury guaranteed by the Seventh Amendment of the Constitution of the United States;

4. Such action was a denial of due process, contrary to the Fifth Amendment of the Constitution of the United States;

5. Such action was a re-examination of facts found by a jury contrary to the Seventh Amendment to the Constitution of the United States;

6. Such action was a departure from the accepted and usual course of judicial proceedings.

ARGUMENT

Point One

Petitioner's Rights under Rule 43(a) Were Denied

Petitioner respectfully directs attention to the following facts with no intention of arguing the case from its standpoint; the verdict of the jury was in its favor and such verdict was erased by the Circuit Court on account of the introduction of evidence which the petitioner claims was admissible.

Petitioner had duly plead the independence of the contract with Bradberry and Sasser, a co-partnership, including the requirement of the independent contractor to provide insurance coverage for their own men, including Workmen's Compensation Insurance (R. 18). The pleading further alleged that the petitioner did not intend to

exercise any direction or control over the independent contractor who was engaged to lay the pipe line; likewise it alleged it exercised no control over the deceased, who was such independent contractor's employee.

As heretofore pointed out in the petition, the pipe line was completed upon real estate which was occupied by the petitioner under an oil and gas lease. This four-inch pipe line, approximately 4,000 feet in length, had been completed on the day of the fatal accident. During the morning of such date the end which was designated as the North end of the line was connected with a high pressure gas line by the crew under the direction of the independent contractor, Hugh Sasser, and the deceased was a member of this crew. Such connection was carried on in the presence of two employees of petitioner, namely, Bob Hopson and Sam Stroder, who were present instructing the crew in the manner in which such a connection could be safely made.

At approximately 1:00 p.m. on such date, Hopson, the aforesaid employee of petitioner, instructed Sasser that before the four-inch line could be connected with the high pressure gas line at the South end, the four-inch line would have to be "blown out". As a part of Respondents' case, it appears that Hugh Sasser, of the firm, was in direct charge of the deceased and the other members of the crew; that at the time Hugh Sasser left to go to the South end to get his men out of the way before the blowing out of the four-inch line, Robert Hopson, petitioner's employee, who was in direct charge of the blowing out, told Hugh Sasser the following:

> "A. I told him I had to blow that new line out before he hooked it up, and he said he was ready. I said, 'Get the men out of the way'. He jumped in the car and said, 'I will get them out of the way'. And I said, 'I am going to turn the gas on that in 10 or 15 minutes'." (R. 40)

This fact also appears as a part of the Respondents' case in the testimony of Sam Stroder, which was introduced by the Respondents (R. 81).

It appears as an undisputed fact in the record that the distance which Sasser had to travel in his automobile was approximately 3,900 feet and that he reached the point where the connection with the two and one-half-inch (2½") line was to be made in approximately three (3) or four (4) minutes, which was ample time to have gotten the men of his crew out of the way. There is no contrary evidence in the record which would sustain a finding that Hopson did not tell Sasser to get his men out of the way.

The Respondents introduced evidence that the two employees of the Lion Oil Company could not see either the South end of the line or the men on the line when they were at the compressor where the gas was turned into the four-inch line (R. 39). The respondents further introduced evidence to the effect that it took approximately 15 minutes after Sasser left in his automobile to go to the South end, for Hopson and Stroder to turn the gas into the four-inch line (R. 43). There is no evidence throughout the whole record that the gas was turned on any sooner than Hopson told Sasser it was going to be turned on, which was in 10 or 15 minutes.

Instead of getting his men out of the way as told to do by the employee of petitioner, Hugh Sasser instructed the men of his crew to move the line with crowbars and such crew had moved approximately one hundred feet of the line at the time the gas was blown through (R. 243-244). The exact cause of the fire does not appear in the evidence.

It became incumbent upon petitioner to prove its allegation that Sasser was an independent contractor and that neither Sasser nor the deceased was subject to the control of the petitioner at the South end of the line. The jury could have very readily inferred that Sasser was taking

his orders from Hopson and that any negligence on Sasser's part was chargeable to the petitioner. As pointed out in the petition, such an inference could have been indulged on account of the following facts which appear in evidence:

1. The real estate on which the pipe line was placed was controlled by petitioner;

2. Petitioner's employees instructed the independent contractor and his crew with regard to the manner in which the North end of the line could be connected;

3. The gas was under the control of petitioner;

4. Sasser, the independent contractor, was told by an employee of petitioner to get his men out of the way.

Any evidence which disproves such inferences was material and competent; the contract was one fact which could be considered by the jury upon the question with regard to whether petitioner exercised, or intended to exercise control over Sasser or the deceased notwithstanding any general contract of employment by the deceased with the independent contractor. In order to attempt to rebut such inferences, the trial court admitted the terms of the independent contract, one of which was the requirement that the independent contractor, Bradberry and Sasser, provide Workmen's Compensation Insurance for their men (R. 176-177). The terms of the contract were material.[6] When competent and relevant, such evidence is not suppressed or throttled by a court under all the authorities which the petitioner has been able to discover in the Federal Courts.[7]

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[6] *Haw* v. *Liberty Mut. Ins. Co.*, (App. D.C.—1950) 180 F. (2d) 18; *Henry W. Cross Co.* v. *Burrus* (C.A.—8th—1936) 81 F. (2d) 856, p. 860.

[7] *O'Brien Construction Co.* v. *Crawford*, (C.A.—9th—1928) 26 F. (2d) 574, p. 575, cert. den. 278 U.S. 630, 73 L. Ed. 548, 49 S. Ct. 29; Ann. 20 A.L.R. 787, 85 A.L.R. 784, 4 A.L.R. (2d) 776; (a compliance with Workmen's Compensation Law is one of the tests to determine whether the relationship is that of an independent contractor. *Powell, et al.* v. *United States Cartridge Co.*, 70 S. Ct. 755, 761, 339 U.S. 497, 507;

The Court of Appeals Below did not hold evidence which proved that the defendant was covered by Workmen's Compensation Insurance inadmissible in the case of *Skelly Oil Co.* vs. *Amacker,* (C. A.—5th—1944) 140 F. (2d) 21. This was a case arising in Texas. Despite all of these cases and the almost unanimous holding generally that such evidence was competent and admissible to prove the existence or non-existence of an independent contract, the court holds that the evidence was highly prejudicial and should have been excluded because of a procedural rule which is a rule of exclusion prevailing in the courts of Texas.[8]

Petitioner submits that such action of the court in applying a Texas rule of exclusion is in derrogation of Rule 43(a), because such evidence would be admissible elsewhere in causes tried in Federal Courts. It is respectfully submitted that such action is contrary to the hereinafter cited cases, all of which hold that Rule 43(a) is not a rule of exclusion, but a rule of admissibility and that before evidence can be excluded it must be incompetent under the law of both the state and federal law; in other words, the evidence must be excluded in both jurisdictions before it becomes inadmissible. Such cases further hold that the rule was intended as a liberalization instead of a suppression of evidence.[9]

Walling v. *Rutherford Food Corp., et al.* (C.A.—10th—1946) 156 F. (2d) 513, p. 515, modified and affirmed 331 U. S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772); *War Emergency Co-op. Assn.* v. *Widenhouse,* (C.A.—4th—1948) 169 F. (2d) 403, 407, cert. den., 335 U. S. 898, 93 L. Ed. 433, 69 S. Ct. 309; *Ingalls Shipbuilding Corp.* v. *Trehern,* (C.A.—5th—1946) 155 F. (2d) 202; *Tullgrun* v. *Jasper,* (Md.—DC—1939) 27 F. Supp. 413, p. 416.

[8] The cases cited in support by the Court Below are: *Texas Co.* v. *Betterton,* 88 S.W. (2) 1038; *Myers* v. *Thomas,* 143 Tex. 502, 186 S.W. (2) 811; *Ford* v. *Carpenter,* 216 S. W. (2d) 558.

[9] *Milwaukee Mechanics Ins. Co.* v. *Oliver, et al.* (C.A.—5th—1944) 139 F. (2d) 405; *Garford Trucking Co.* v. *Mann,* (C.A.—1st—1947) 163 F. (2d) 71; *Mattox* v. *New Syndicate Co.* (C.A.—2nd—1949) 176 F. (2d)

Petitioner respectfully submits that the action of the Court Below in applying a Texas rule of exclusion is a denial of a federal right which exists under the provisions of Rule 43(a) and that such a denial caused the erasure of a jury verdict in favor of petitioner.

Point Two

The Court of Appeals Below Has Not Applied Rule 61

For a factual background relative to the circumstances under which the evidence that the petitioner required in its contract that the independent contractor keep their men insured was introduced in evidence, the Court is respectfully referred to pp. 23-25 of this brief under Point One. If despite Rule 43(a), and because of a Texas rule of exclusion the evidence was inadmissible, the Court Below has not applied Rule 61 because it has not considered the entire record to determine whether substantial justice has been done. No reference is made to the motion for a new trial filed by Respondents (R. 328-333), nor to the statement of the trial court that in his opinion the case had been fully and fairly tried (R. 281). The action of the court creates prejudice as a matter of law and sets the verdict aside when there is nothing in the record to reflect that such claimed inadmissible evidence so aroused the

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897, p. 901; 12 A.L.R. (2d) 988; *Mourikas* v. *Vardimis* (C.A.—4th—1948) 169 F. (2d) 53, which case holds that if there is doubt, it should be admitted; *Natl. Battery Co.* v. *Levy* (C.A.—8th—1942) 126 F. (2d) 33, p. 36, cert. den. 62 S. Ct. 1294, 316 U.S. 1294, 316 U.S. 697, 86 L. Ed. 1767; *Commerce Banking Corp.* v. *Martel* (C.A.—2nd—1941) 123 F. (2d) 846; *Norwood* v. *Great American Indemnity Co.* (C.A.—3rd—1944) 146 F. (2d) 979; *Dellefield* v. *Blockdel Realty Co.* (C.A.—2d—1942) 128 F. (2d) 85, p. 93; *Rick* v. *Pacific Atlantic S.S. Co.* (C.A.—2d—1950) 180 F. (2d) 866, 869; *Moran* v. *Pittsburgh-Des Moines Steel Co., et al.* (C.A.—3rd—1950) 183 F. (2d) 467, p. 472; *Aetna Life Ins. Co.* v. *McAdoo,* (8th Cir.), 106 F. (2d) 618; *Peoples Loan & Invest. Co.* v. *Travelers Ins. Co.* (8th Cir.) 151 F. (2d) 437; *Stewart* v. *Baltimore & O. Ry. Co.,* (2nd Cir.), 137 F. (2d) 527, 16 NCCA U. S. 1; *Wright* v. *Wilson* (3rd Cir.), 154 F. (2d) 616, 170 A.L.R. 1237.

passion and prejudice of the jury that they found against the Respondents. There is no finding by the Court that the discretion of the trial court had been abused when such court overruled the Respondents' motion for a new trial.

Petitioner submits that the opinion will bear no other reasonable construction than that the court was dissatisfied with the verdict and felt that the respondents should have a retrial. So far as the opinion is concerned, the only consideration evidenced was the purely technical error relative to the admission of evidence contrary to an exclusion prevailing in the courts of Texas; the Court did not undertake to analyze the entire record from the standpoint of any prejudice which might be created thereby.

Furthermore, the statements in the opinion do such violence to the record that no other construction can be placed thereon than that the entire record has not been considered; that the only consideration was the claimed technical error with regard to the admissibility of evidence. The statement is made (R. 354) that this matter of insurance was "continuously brought and kept before the jury * * * ", when the record reflects that at only one point in the record is there any evidence thereon (R. 176-177). There was nothing more than a general objection on the part of Respondents; there was no request for a qualification or a limitation of any character whatsoever. This evidence reveals only five lines of actual testimony in regard to insurance and any other references thereto were merely objections on the part of the respondents and a certain colloquy which occurred between counsel. The supplemental transcript which petitioner will always contend the court had no right to consider, because it was unauthenticated by either the trial court or counsel for appellee (R. 344-352), reflects probably two short paragraphs of argument by counsel for petitioner (R. 346-347). Even in its defective form the transcript reflects no objec-

tion or exception on the part of Respondents, or a motion for a mistrial. Such illegal transcript further reflects a colloquy between counsel prior to the selection of the jury, but it does not reflect that such colloquy was in the presence and hearing of the panel (R. 348-352). So even if this defective record is considered, it surely does not reflect that the matter was continuously brought and kept before the jury. At only one other point was such matter of insurance even referred to, which reference was in the reading of the pleadings, which is the equivalent of an opening statement to the jury. There was no reference to any settlement or payment of any sum whatsoever by the intervenor, the Respondent Hartford Accident and Indemnity Company. This matter was excluded from the jury and no reference whatsoever is made in the opinion to such exclusion. Aside from the colloquy between counsel, which could not have been avoided by petitioner, the entire evidence and the entire reference to insurance, including the excerpt from petitioner's argument, would probably cover one whole page in the entire record. This lacks much of being constantly kept and brought before the jury.[10]

The opinion of the court makes a stagger at finding bad faith on the part of the counsel for petitioner, but such imputation if it is present is not borne out by the record, because the trial court found none.[11] If counsel had been in bad faith, he would have made capital out of the collection of compensation by Respondents and the intervention of the insurer. The opinion of the court implies that such was done, but the record reflects the contrary (R. 26-27).

An examination of the entire record reflects no manner

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[10] *Louisville N. Ry.* v. *Botts* (C.A.—8th—1949) 173 F. (2d) 164.

[11] *De Waay* v. *Dominick, et al.* (C.A.—2nd—1949) 174 F. (2d) 204; *Smith* v. *Town of Orangetown* (C.A.—2nd—1945) 150 F. (2d) 782; cert. den. 66 S. Ct. 175, 326 U.S. 767, 90 L. Ed. 462.

in which the petitioner could have foreseen that Sasser would not do just precisely that which Hopson, petitioner's employee, told him to do under the undisputed record. Instead of getting his men out of the way, Sasser had his men move a section of the pipe with crowbars. There is nothing in the record which would reveal any manner in which Hopson or Stroder, the two employees of Petitioner who were present, could have seen or could have foreseen such action on the part of Sasser. Petitioner submits that an examination of the entire record would reflect that the facts did not justify a recovery by Respondents and that any verdict in their favor would have necessarily been set aside by the trial court; therefore any error complained of was purely academic, technical and had no effect whatsoever upon the substantial rights of the Respondents. The opinion reflects no examination by the court of the whole record; in so far as the opinion is concerned, the facts were not even considered. Petitioner submits that under Rule 61 the court was bound to examine the entire record to determine whether there was an error which resulted in prejudice to the rights of the Respondents.

In conclusion under this point of error, Petitioner submits that a federal right belonging to petitioner by virtue of Rule 61 has been denied; that such action of the court is contrary to the following authorities:[12]

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[12] *Dunn* v. *Jefferson Standard Life Ins. Co.* (C.A.—5th—1941) 123 F. (2d) 815; *Gutschall* v. *Wood*, 74 App. D.C. 379, 123 F. (2d) 174; *Adams* v. *Capital Transit Co.* (App. D.C.—1946) 154 F. (2d) 859, 860; *Stancasak* v. *Pennsylvania R. Co.* (C.A.—7th—1949) 174 F. (2d) 43, p. 48; *Goree* v. *McDowell*, (C.A.—7th—1940) 116 F. (2d) 78, cert. den. 313 U.S. 561, 61 S. Ct. 837, 85 L. Ed. 1521; *Paxson* v. *Davis* (App. D.C.—1933), 65 F. (2d) 492, cert. den. 290 U.S. 643, 54 S. Ct. 61, 85 L. Ed. 1521.

Point Three

Petitioner Was Denied the Right to Prove Its Contract in Totality Before a Jury, Contrary to the Seventh Amendment to the United States Constitution.

For a factual statement relative to the competency and materiality of the contract in totality the Court is referred to the factual background stated under Points One and Two, pp. 23 and 28 of the brief. This liberty is taken in order to shorten and simplify this brief as much as possible.

It was not the intention of the framers of the Constitution to deprive a party of his right to introduce evidence in the trial of an action before a jury solely because of a state rule of exclusion. In this cause the Court Below has deprived Petitioner of its right to prove its contract in totality solely because of a rule of exclusion pertaining to certain actions tried in the courts of Texas. In thus depriving Petitioner of such right, it is submitted that there is a denial of a right to a jury trial under the Constitution of the United States.

In other circuits, and likewise in other states in the Fifth Circuit, a litigant in the Federal Court would have such a right to prove a contract in totality, even though it involved insurance. The authorities in support thereof have been heretofore cited under Footnote 7, p. 26 of the brief and will not be here repeated. Petitioner also cites the case of *King* v. *Southwestern Greyhound Lines* (C.A. 10th, 1948) 169 F. (2d) 497, p. 500, where the entire contract was considered. The right to a jury trial includes the right on the part of the party whose rights are sought to be affected, to introduce evidence and have a judicial finding based thereon. The action of the Court Below is contrary in principle to *Gasoline Products, Inc.* v. *Champlin Refining Co.*, (1931), 283 U.S. 494, 75 L. Ed. 1188, 51 S. Ct. 513, wherein it was held that a litigant in the Federal

Court could not be arbitrarily deprived of his rights to prove a fact by any procedural rule.

In conclusion, petitioner respectfully submits that the action of the court below deprives it of its right to a trial by a jury under the Constitution of the United States.

Point Four

Petitioner Was Denied Due Process Contrary to the Fifth Amendment

By the enactment of the former Title 28 U. S. C. A., Sec. 723(b) and 723(c) in 1934, Congress intended to empower the Supreme Court to promulgate a uniform and equal system of rules and procedure for the trial of civil action in Federal Courts. If now, twelve years after such rules have been promulgated, a litigant in Texas can be deprived of the right to introduce the same evidence which a litigant in other Federal Courts would be permitted to introduce under the rules solely because of a Texas rule of exclusion, the whole intent and purpose of the Rules has been destroyed and subverted.

Petitioner submits that if a jury in the Federal Courts of other states is not so aroused and impassioned by the introduction of evidence with regard to the requirement of insurance, such evidence could not arouse a jury in Texas. Certainly the courts of Texas cannot so decide that a verdict is thus impassioned and prejudiced and thereby control the trial of causes in the courts of the United States. The court below has allowed the Texas courts to decide this very fundamental issue contrary to the rights of petitioner under the Fed. Rules of Civ. Proc.

To deny the same procedural rights to a litigant in the Federal Courts of Texas because of a state rule of procedure is an unjust, arbitrary and unreasonable discrimination to such a degree that due process of law is denied to

petitioner. It is realized that there are no cases directly in point which can be cited; it is also realized that the Fifth Amendment guarantees no particular form of procedure,[13] but where rules of procedure have become fixed and such evidence is admissible in other Federal Courts, to hold the same evidence prejudicial in Texas because of a local rule of exclusion is such an arbitrary discrimination as to amount to a denial of due process contrary to the Fifth Amendment to the Constitution of the United States.

Point Five

The Facts Were Re-examined Contrary to the Seventh Amendment

The Respondents filed a motion for a new trial (R. 329-333), in which complaint was made with regard to the claimed prejudicial effect of the evidence which the Circuit Court holds inadmissible. In denying such motion, the trial court stated that the cause had been fully and fairly tried (R. 281). The opinion of the court below in legal effect reverses such action and found prejudice as a matter of law when the record reveals the contrary. To create prejudice merely because a jury decided in favor of a defendant is to indulge in a review contrary to the Seventh Amendment.

The action of the court in creating prejudice as a matter of law is contrary to the expressed principles in *Dennis* v. *U. S.*, 339 U. S. 162, 168, 94 L. Ed. 734, 407, 70 S. Ct. 519, 521, wherein it was said:

> "No question of actual bias is before us. The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact. * * *"

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[13] *National Labor Relations Bd.* v. *Mackay R. & Tel. Co.*, 58 S. Ct. 904, 913, 304 U. S. 333, 351, 82 L. Ed. 1381.

In this cause the trial court, who had heard the evidence, observed all the witnesses and all the proceedings had before the jury, was in a much better position to pass upon the justice or injustice of the proceedings before the jury. Notwithstanding the trial court's finding that prejudice, bias, or misconduct did not exist, the court below found prejudice as a matter of law. There should be no room even for speculation when the trial court specifically finds that regardless of whether the evidence was admissible, the Respondents had received a fair and a full trial.

Petitioner submits that the action of the court below is a review and a reweighing of the evidence contrary to the Seventh Amendment and it is likewise contrary to the following cases which hold that an appellate court cannot reweigh the evidence because it is contrary to the Seventh Amendment to the United States Constitution: *Lavender* v. *Kurn et al.*, 327 U. S. 645, p. 653, 66 S. Ct. 740, p. 744, 90 L. Ed. 916; *American Smelting Co.* v. *Sutyak* (C. A. 6th, 1949), 175 F. (2d) 123; *Spero-Nelson* v. *Brown* (C. A. 6th, 1949), 175 F. (2d) 86; *Francis* v. *Southern Pacific Co.* (C. A. 10th, 1947), 162 F. (2d) 813, affirmed 68 S. Ct. 611, 614, 333 U. S. 445, 92 L. Ed. 798; *Everett* v. *Southern Pacific Co.* (C. A. 9th, 1950), 181 F. (2d) 58, 62; *Aetna Casualty & Surety Co.* v. *Yeatts* (C. A. 4th, 1941), 122 F. (2d) 350, p. 354; *Pasotex Pipe Line Co.* v. *Murray* (C. A. 5th, 1948), 168 F. (2d) 661, p. 662.

In conclusion, petitioner respectfully submits that it has been denied its rights to a review according to the principles of the common law and thereby its rights under the Constitution of the United States have been denied.

Point Six

The Court of Appeals Below Has Departed from the Usual and Accepted Course of Judicial Proceedings

From time immemorial it has been the law that an appellate court cannot examine an unauthenticated record. The supplemental transcript (R. 344-352) bears no authentication whatsoever on the part of either the trial court or the counsel for appellee. The manner in which the clerk secured the Excerpts from Argument and the Partial and Supplementary Transcript of Proceedings is not shown by the record. The entire supplement reflects no file mark by the clerk and his certificate is defective in that it reflects no reason for the certification except that it is from the records now remaining (R. 352).

This claimed supplemental transcript contains no report of the entire argument. It contains statements which are pure conclusions as to the result of certain happenings and it has no showing whatsoever of any notice whatsoever to counsel for appellee. It reflects no compliance whatsoever with Rule 75 (a)(b), either as to notice or as to the length of time which counsel for appellee has to object to any such inclusion. Yet notwithstanding such defective transcript, the court based its action thereon and quoted therefrom in the footnote to the opinion (R. 354).

Petitioner submits that this is a violation of Rule 75(a)(b) and it is a violation of the accepted course of due judicial proceedings in that from time immemorial there must have been some authentication or settlement with regard to alleged errors in judicial proceedings.

Petitioner submits that in its consideration of this defective transcript the court has violated one of its own decisions. *Lemley* v. *Christopher* (C. A. 5th, 1945), 150 F. (2d) 291. It has likewise refused to follow the causes

which hold that there must be some authentication or settlement of some character.[14]

It is further submitted that the court has refused to follow its own prior decision. *Skelly Oil Co.* v. *Amacker et al.* (C. A. 5th, 1944), 140 F. (2d) 21. As heretofore pointed out under Point 2, the court has done violence to the record in the creation of prejudice as a matter of law and in its further statement that this matter was continuously brought before the jury.

In conclusion, petitioner submits that it has not received a review of this cause in accordance with the Constitution and the laws of the United States and that thereby a Federal right has been denied to it.

Conclusion

For the reasons stated in the petition and in this brief, and particularly since this case involves important questions with regard to whether a state rule of exclusion applies to actions tried in a Federal court and whether the action of the court below was in derogation of petitioner's rights existing by virtue of the Fed. Rules of Civ. Proc., 28 U. S. C. A., and also by the specified provisions of the United States Constitution, petitioner urges that a writ of certiorari be issued in order that the questions presented in the foregoing petition may be reviewed by this Court.

Dated at Dallas, Texas, this 22 day of February, 1951.

Respectfully submitted,

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[14] *George A. Ohl & Co.* v. *A. L. Smith Iron Works*, 288 U.S. 170, 53 S. Ct. 340 77 L. Ed. 681; *Warren* v. *U. S.*, 183 F. 718, 106 C.C.A. 156, 33 L.R.A. (N.S.) 800; *Baldwin* v. *Myers*, (C.A.—8th—17935), 75 F. (2d) 529.